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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

SHENIQUE ROUTE, individually and  
on behalf of all others similarly situated,

Case No. CV 12-07350-GW-JEM

18 || Plaintiff,

**DEFENDANT MEAD JOHNSON &  
COMPANY, LLC'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO STRIKE**

20 MEAD JOHNSON NUTRITION  
COMPANY d/b/a MEAD JOHNSON &  
21 COMPANY, LLC

## Defendant

Date: February 21, 2013  
Time: 8:30 a.m.  
Ctrm: 10  
Judge: Hon. George Wu

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## INTRODUCTION

Proceeding from her alleged purchase of Enfamil® Premium® Infant formula in Los Angeles in November 2011, Shenique Routé wants to represent:

- 1        4) A nationwide class of purchasers over whose claims California law will  
2              5) not apply;
- 3        6) In relation to a number of products which she never bought.

Pursuant to Federal Rules of Civil Procedure 12(f) and 23(d)(1)(D), Mead Johnson & Company, LLC (“Mead Johnson”) moves this Court to strike from the First Amended Complaint (“FAC”):

- 9        10) All allegations by which Plaintiff purports to represent a nationwide  
11              12) class; and
- 12        13) All allegations relating products which Plaintiff did not purchase.

## RELEVANT FACTS

Mead Johnson’s 12(b)(6) motion describes Plaintiff’s allegations and claims for relief. Mead Johnson recites only those allegations pertinent to this motion to strike.

*Allegations Relevant to Class Definition:* In relation to her claims for breach of warranty, Plaintiff seeks to represent a nationwide class, which she defines as “all persons in the United States who purchased the Mislabeled Products for personal or household use, and not for resale or distribution.” (FAC ¶ 33.)<sup>1</sup> The FAC alleges that Plaintiff is a resident of the State of California and purchased the formula in California from a Target store. (FAC ¶ 16.) The FAC alleges that Mead Johnson & Company, LLC is a Delaware LLC, with its principal place of business in Glenview, Illinois. (FAC ¶ 18.) The FAC makes no allegation that Mead Johnson manufactured the product in California, developed product advertising in California, or that any other relevant conduct occurred in California except the sale of formula to Ms. Routé.

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<sup>1</sup> She also purports to represent a subclass of California purchasers with respect to these counts. (FAC ¶ 34.)

1           *Allegations Relevant to Products that Shenique Routé did not buy or use:*  
 2 Plaintiff purports to have purchased a single Mead Johnson product, Enfamil  
 3 Premium® Infant. (FAC ¶ 16.) She also purports to represent absent class  
 4 members who purchased three other products, which she does not claim to have  
 5 purchased herself: Enfamil A.R.®, Enfamil Premium Newborn, and Enfagrow®  
 6 Older Toddler Vanilla Milk Drink. (FAC ¶ 1.) She has appended labels for three  
 7 of these products to her FAC as Exhibit A.

8           This product labeling shows important differences between these products.  
 9 Enfamil Premium Infant's label states that the product is a milk-based formula for  
 10 babies 0-12 months. It states that it has "Natural Defense™ Dual Prebiotics for  
 11 digestive health." It also states: "Experts agree on the many benefits of breast  
 12 milk. If you chose to use infant formula, ask your baby's doctor about Enfamil  
 13 Infant." It elsewhere states: "Use as directed by your baby's doctor."

14           Enfamil A.R.'s label states that the product is thickened with added rice  
 15 starch for babies 0-12 months who spit up frequently. (FAC at Ex. A.) It says  
 16 little about Natural Defense Dual Prebiotic Blend, except that it is "for digestive  
 17 health." It does state that the product is clinically proven to reduce frequent spit  
 18 up, and indicates that this claim is based on "a clinical study of Enfamil A.R. infant  
 19 formula before the addition of DHA, ARA and prebiotics with infants who spit up  
 20 frequently (5 or more spit ups per day.)" It states: "Experts agree on the many  
 21 benefits of breast milk. If you chose to use infant formula, ask your baby's doctor  
 22 about Enfamil A.R." It later states: "Ask your baby's doctor which formula is  
 23 appropriate for your baby."

24           Enfagrow Older Toddler Vanilla Milk Drink is labeled for children 1 year  
 25 and older. It is a vanilla milk drink "tailored to meet your child's changing  
 26 nutritional needs." It makes no mention of the benefits of breast milk, or about  
 27 seeking the advice the infant's doctor. The label states that it has 22 nutrients to  
 28 support growth; DHA to help support brain and eye development; and antioxidants

1 and other nutrients to help support the immune system. (FAC at Ex A.) It states  
 2 that it has “Natural Defense Dual Prebiotics Blend, designed to help support  
 3 digestive health.”

4 Plaintiff has not appended a label for Enfamil Premium Newborn. She has  
 5 alleged nothing about her baby or about any consultations with her baby’s doctor  
 6 regarding the use of infant formula. She does not claim to have reviewed labels for  
 7 any product other than Enfamil Premium Infant.

8 **ARGUMENT**

9 **I. THIS COURT MAY STRIKE IMPROPER CLASS ALLEGATIONS**

10 The Supreme Court has recognized that sometimes the impossibility of class  
 11 certification will be apparent on the face of the complaint. *Gen. Tel. of the Sw. v.*  
 12 *Falcon*, 457 U.S. 147, 160 (1982). So it is here, where Plaintiff seeks certification  
 13 of a nationwide class over which the laws of all fifty states will apply, and where  
 14 Plaintiff seeks to represent absent class members in relation to products she never  
 15 purchased.

16 Mead Johnson brings the motion pursuant to Fed. R. Civ. P. 12(f), which  
 17 permits the Court to strike from the FAC any “immaterial, impertinent or  
 18 scandalous matter.” It also brings the motion pursuant to Fed. R. Civ. P.  
 19 23(d)(1)(D), which permits the Court to “require that the pleadings be amended to  
 20 eliminate allegations about representation of absent persons and that the action  
 21 proceed accordingly.” The Ninth Circuit has observed that the purpose of Rule  
 22 12(f) is to avoid “the expenditure of time and money that must arise from litigating  
 23 spurious issues by dispensing with those issues prior to trial.” *Whittlestone, Inc. v.*  
 24 *Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy v. Fogerty*,  
 25 984 F.2d 1524, 1527 (9th Cir. 1993)). That purpose will be served here, where  
 26 dispensing with frivolous class allegations will streamline discovery in the event  
 27 that this case lasts beyond the pleading stage.

28

Indeed, the Sixth Circuit has recently noted that the pleading stage is not a premature juncture at which to address class allegations that have no chance of success. In *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011), the Sixth Circuit affirmed the district court's order granting a motion to strike plaintiff's nationwide class allegations. Essential to the Court's ruling was the determination that plaintiffs "do not explain what type of discovery or what type of factual development would alter the central defect in this class claim." *Id.* at 949. The Sixth Circuit found this "key reality" dispositive: "Their claims are governed by different States' laws, a largely legal determination, and no proffered or potential factual development offers any hope of altering that conclusion, one that generally will preclude class certification." *Id.*; see also *Rikos v. Procter & Gamble Co.*, No. 11-cv-226, 2012 WL 641946, at \*5 (S.D. Ohio Feb. 28, 2012) ("While it is true that discovery may define the class more precisely, the fact remains that a nationwide class consisting of all purchasers of Align will inevitably include non-California residents who purchased the product outside of California."); *In re Yasmin & Yaz (Drospirenone) Mktg.*, 275 F.R.D. 270, 274 (S.D. Ill. 2011) (granting motion to strike class allegations after concluding that "defendants have identified numerous facial deficiencies in the class allegations" and that "no amount of time or discovery can cure these deficiencies").

## **II. THIS COURT SHOULD STRIKE ALL ALLEGATIONS BY WHICH PLAINTIFF SEEKS TO REPRESENT A NATIONWIDE CLASS**

### **A. Controlling Ninth Circuit Precedent Forecloses the Certification of a Nationwide Class Where Variances in State Law Overwhelm Common Issues of Fact**

Earlier this year, the Ninth Circuit held that putative nationwide class actions asserting consumer protection claims should not be certified under Rule 23. In *Mazza v. American Honda Motor Co.*, the class plaintiffs sought to certify a nationwide class based on allegations that Honda concealed material information

1 in connection with its marketing and sales of Acura vehicles equipped with a  
 2 particular breaking system. *See* 666 F.3d 581, 585–87 (9th Cir. 2012). Plaintiffs  
 3 had brought claims under California’s Unfair Competition Law (“UCL”), CAL.  
 4 BUS. & PROF. CODE § 17200 *et seq.*, False Advertising Law (“FAL”), CAL. BUS. &  
 5 PROF. CODE § 17500 *et seq.*, and the Consumers Legal Remedies Act (“CLRA”),  
 6 CAL. CIV. CODE § 1750 *et seq.*, and a claim for unjust enrichment. *Id.* at 587.  
 7 Honda had its principal place of business in California, and conceived its  
 8 marketing plan in California. Therefore, the trial court concluded that California  
 9 law could supply a uniform rule of decision for a nationwide class, as California  
 10 had the most significant governmental interest in application of its law.

11 On appeal from the district court’s certification of a nationwide class, the  
 12 Ninth Circuit reversed, concluding that “the district court abused its discretion in  
 13 certifying a class under California law that contained class members who  
 14 purchased or leased their car in different jurisdictions with materially different  
 15 consumer protection laws.” *Id.* at 590. In reaching this decision, the *Mazza* Court  
 16 applied a three-part test to determine choice of law for the nationwide class, which  
 17 required the Court to do the following: (1) determine if the laws of other states  
 18 “materially differ” from California law; (2) if the laws materially differ, determine  
 19 each state’s respective interest in application of its law; and (3) if the laws  
 20 materially differ and both states have an interest in the litigation, apply the law of  
 21 the state whose interest would be “more impaired” if its law were not applied. *Id.*  
 22 at 590–94; *see also Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1233  
 23 (9th Cir. 2011).

24 To demonstrate materiality, Honda detailed the ways in which California  
 25 law differs from the laws of the 43 other jurisdictions in which class members  
 26 resided, finding that consumer protection statutes in various states differed from  
 27 one another with respect to scienter and reliance requirements. *See* 666 F.3d at  
 28 591. There were also material differences in the available remedies across states.

1       *Id.* Next, the Court analyzed whether foreign jurisdictions had a compelling  
 2 interest in applying their own consumer protection laws, and held that they did. *Id.*  
 3 at 592 (“Each of our states also has an interest in ‘being able to assure individuals  
 4 and commercial entities operating within its territory that applicable limitations on  
 5 liability set forth in the jurisdiction’s law will be available to those individuals and  
 6 business in the event they are faced with litigation in the future.’” (quoting  
 7 *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 97–98 (2010))). Finally, the  
 8 Court held that “[t]hese foreign states have a strong interest in the application of  
 9 their laws to transactions between their citizens and corporations doing business  
 10 within their state,” while “California’s interest in applying its law to residents of  
 11 foreign states is attenuated.” *Id.* at 594. Critical to this final holding was the fact  
 12 that “the last events necessary for liability as to the foreign class members—  
 13 *communication of the advertisements* to the claimants and their reliance thereon in  
 14 purchasing the vehicles—took place in the various foreign states, not in  
 15 California.” *Id.* (emphasis added). Thus, “each class member’s consumer  
 16 protection claim should be governed by the consumer protection laws of the  
 17 jurisdiction in which the transaction took place.” *Id.* at 594.

18       Consequently, the *Mazza* Court concluded that “variances in state law  
 19 overwhelm[ed] common issues and preclude[d] predominance for a single  
 20 nationwide class.” *Id.* at 597. Hence, the Court held that “each class member’s  
 21 consumer protection claim should be governed by the consumer protection laws of  
 22 the jurisdiction in which the transaction took place.” *Id.* at 594.

23       The Ninth Circuit’s holding in *Mazza* is consistent with decisions in other  
 24 Circuits which have held that class actions implicating variations in state law are  
 25 not certifiable on a nationwide basis due to lack of predominance under FRCP  
 26 23(b)(3). See *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946–49 (6th  
 27 Cir. 2011); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015–18 (7th Cir.  
 28 2002); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *Georgine v.*

1       *Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem*  
 2       *Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Grand Theft Auto Video Game*,  
 3       251 F.R.D. 139, 147 (S.D.N.Y. 2008).

4              In the wake of *Mazza*, California district courts have repeatedly recognized  
 5       that plaintiffs cannot obtain certification of nationwide classes under California  
 6       law. *See, e.g., Schwartz v. Lights of America*, 2012 WL 4497398, at \*8 (C.D. Cal.  
 7       Aug. 31, 2012) (“After *Mazza*, if a material conflict of law exists, it is difficult to  
 8       imagine a false advertisement claim where a court could apply California law to a  
 9       nationwide class.”); *Ralston v. Mortg. Inv. Group, Inc.*, No. 08-cv-536, 2012 WL  
 10      1094633, at \*3 (N.D. Cal. Mar. 30, 2012) (“In light of the Ninth Circuit’s recent  
 11     decision in [*Mazza*], the Court concludes that the class [asserting claims under the  
 12     UCL] must be limited to California residents.”); *Kowalsky v. Hewlett-Packard Co.*,  
 13     No. 10-cv-2176, 2012 WL 892427, at \*7 (N.D. Cal. Mar. 14, 2012) (“Plaintiff  
 14     offers no argument, other than asserting that *Mazza* was wrongly decided, to  
 15     circumvent *Mazza*’s holding, which precludes the certification of a nationwide  
 16     class asserting claims under the UCL and the CLRA.”); *Gianino v. Alacer Corp.*,  
 17     846 F. Supp. 2d 1096, 1103 (C.D. Cal. 2012) (denying certification of nationwide  
 18     class asserting UCL, FAL, and CLRA claims because “every state would be  
 19     impaired in its ability to protect the consumers within its borders if California law  
 20     were applied to all claims of the nationwide class”).

21              **B. Mazza Compels That This Court Strike Plaintiff’s Nationwide**  
 22              **Class Claims For Breach of Warranty**

23              Presumably in recognition of *Mazza*’s application to her claims under the  
 24       CLRA, UCL, and FAL, Plaintiff has confined the putative nationwide class to her  
 25       claims for breach of warranty. However, even if these claims survive Mead  
 26       Johnson’s 12(b)(6) motion to dismiss, there is no reason why the choice of law  
 27       analysis would be any different for these counts.

As an initial matter, it is well established that states have different rules that apply to breach of warranty. Moreover, it is the *plaintiff's* burden to demonstrate that variations in state law do not predominate over common issues of fact. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741–42 (5th Cir. 1996). For example, in *Cole v. General Motors*, 484 F.3d 717, 725–26 (5th Cir. 2007), the Fifth Circuit held that numerous differences in express warranty laws of the fifty states precluded a finding of predominance. Specifically, the *Cole* Court concluded that “plaintiffs did not sufficiently demonstrate the [Rule 23(b)] predominance requirement because they failed both to undertake the required extensive analysis of variations in state law concerning their claims and to consider how those variations impact predominance.” *Id.* at 725. Other Circuits have likewise reached the same conclusion in the class action context, with respect to the variability of express and implied warranty laws across jurisdictions. *See also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016–17 (D.C. Cir. 1986) (vacating certification and remanding for determination on whether state law warranty differences precluded finding of predominance); *Highway Sales, Inc. v. Blue Bird Corp.*, 559 F.3d 782, 795 n.13 (8th Cir. 2009) (Beam, J., concurring in part and dissenting in part) (noting that some states require privity as an element of warranty claims, while others do not); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017–19 (7th Cir. 2002) (explaining differences in state warranty laws across the 50 states and reversing certification of nationwide class on the grounds that such class was unmanageable); 18 WILLISTON ON CONTRACTS §§ 52:45, 52:67 (4th ed. 2012) (indexing differences in elements of express warranty laws across jurisdictions).

The same conclusions that led the *Mazza* Court to reject certification of a nationwide class apply with even greater force in this case. The State of California has no connection to this case at all, other than its interest in product sales to its own residents. Other states have an equal interest that in seeing that their own

1 state laws apply to the claims of their residents, which would be impaired by the  
 2 application of California law. Meanwhile, the application of the laws of other  
 3 states to their own residents will in no way hinder California's interests.

4         In a recent case with facts very similar to the instant controversy, the  
 5 Southern District of Ohio—applying California's three-part choice-of-law  
 6 framework—granted a motion to strike plaintiff's breach of warranty claims on  
 7 behalf of a nationwide class “because a choice of law analysis demonstrates that  
 8 individual questions of law predominate.” *Rikos v. Procter & Gamble Co.*, No.  
 9 11-cv-226, 2012 WL 641946, at \*5 (S.D. Ohio Feb. 28, 2012). The plaintiff  
 10 brought claims for violations of the CLRA, UCL, and for breach of express  
 11 warranty, based on P&G's national marketing of a product called “Align,” which  
 12 advertised the product as containing probiotics and providing “great digestion  
 13 through science.” *Id.* at \*1. Plaintiff sought to certify a nationwide class, and  
 14 P&G moved to strike the class allegations.

15         In granting the motion to strike, the *Rikos* Court's analysis closely tracked  
 16 that of *Mazza*. First, the *Rikos* Court found at least four material differences  
 17 between California's warranty laws and the warranty laws of other states: (1)  
 18 California provides an exception to the privity requirement for purchases where the  
 19 plaintiff relied on the product's labels or advertisements, while other states bar  
 20 claims for breach of express warranty in the absence of privity and a third category  
 21 have no privity requirement at all; (2) California holds that statements of mere  
 22 “puffery” do not constitute an express warranty, while other states hold that a  
 23 warranty is created when the natural tendency of the statement is to induce a  
 24 purchase; (3) California does not require reliance as an element of a breach of  
 25 warranty claim, while some states require reliance, others apply a burden-shifting  
 26 method, and still others presume reliance; and (4) California requires plaintiffs in  
 27 express warranty actions to give notice to the manufacturer, while other states  
 28 require notice only to the seller, and some do not require notice at all. *Id.* Second,

1 the Court held that “[a]llowing each state to apply its own laws ‘assure[s]  
 2 individuals and commercial entities operating within its territory that applicable  
 3 limitations on liability set forth in the jurisdiction’s law will be available to those  
 4 individuals and businesses in the event they are faced with litigation in the  
 5 future.’” *Id.* at \*6 (quoting *McCann*, 48 Cal. 4th at 91). Finally, as in *Mazza*, the  
 6 *Rikos* Court held that “[i]n a consumer products case, the last events necessary for  
 7 liability are communication of the advertisements to the claimants and their  
 8 purchase of the products,” and accordingly, “the states where [the product] was  
 9 purchased have the predominant interest in the application of their laws to  
 10 transactions between their citizens and Procter & Gamble.” *Id.* Therefore, the  
 11 *Rikos* Court struck plaintiff’s nationwide class allegations, on the grounds that  
 12 “individual questions of law predominate Plaintiff’s claims.” *Id.* at \*7.

13 In sum, breach of warranty laws are anything but uniform; rather, the  
 14 elements necessary to state a claim under such laws vary significantly. Thus,  
 15 Routé’s nationwide class definition should be stricken.

16 **III. THIS COURT SHOULD STRIKE ALL ALLEGATIONS BY WHICH**  
 17 **PLAINTIFF SEEKS TO REPRESENT PURCHASERS OF**  
 18 **PRODUCTS THAT SHE, HERSELF, DID NOT BUY**

19 Plaintiff has not alleged that she ever purchased Enfamil A.R.®, Enfamil  
 20 Premium Newborn, and Enfagrow® Premium Older Toddler Vanilla Milk Drink.  
 21 Consequently, her claims are neither common nor typical of class members, nor  
 22 can she adequately represent persons who purchased these three products.

23 Rule 23(a)(2) requires plaintiff to show that “there are questions of law or  
 24 fact common to the class.” Fed. R. Civ. P. 23(a)(2). In *Dukes*, the Supreme Court  
 25 instructed that, in order to satisfy the commonality requirement, plaintiffs must  
 26 demonstrate that their claims “depend upon a common contention” that is “capable  
 27 of classwide resolution—which means that determination of its truth or falsity will

1 resolve an issue that is central to the validity of each one of the claims in one  
 2 stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

3 Similarly, under Ninth Circuit law, to satisfy the typicality requirement of  
 4 Rule 23(a)(3) that “the claims or defenses of the representative parties are typical  
 5 of the claims or defenses of the class,” the plaintiff’s claims must be “reasonably  
 6 coextensive with those of absent class members.” *Guido v. L’Oreal, USA, Inc.*,  
 7 2012 WL 2458118, at \*1 (C.D. Cal. June 25, 2012) (quoting *Hanlon v. Chrysler*  
 8 *Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). The test for typicality is “whether  
 9 other members have the same or similar injury, whether the action is based on  
 10 conduct which is not unique to the named plaintiffs, and whether other class  
 11 members have been injured by the same course of conduct.” *Wiener v. Dannon*  
 12 *Co.*, 255 F.R.D. 658, 665 (C.D. Cal. 2009) (quoting *Hanon v. Dataproducts Corp.*,  
 13 976 F.2d 497, 508 (9th Cir. 1992)).

14 In cases involving a variety of products, courts, emphasizing that different  
 15 products have different functions and different consumers, have held that a named  
 16 plaintiff that purchased a different product than that purchased by unnamed  
 17 plaintiffs fails to satisfy the typicality requirement of Rule 23(a)(3). See, e.g.,  
 18 *Wiener*, 255 F.R.D. at 665; *Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616  
 19 (S.D. Cal. 2007) (finding that named plaintiff did not satisfy the Rule 23(a)(3)  
 20 typicality requirement where product plaintiff purchased was not one of the 28  
 21 products subject to allegedly false hair strengthening claims); *Lewis Tree Serv., Inc. v. Lucent Techs. Inc.*, 211 F.R.D. 228 (S.D.N.Y. 2002) (holding that the named  
 22 plaintiff, who purchased only two of the more than 60 products at issue, did not  
 23 satisfy the Rule 23(a)(3) typicality requirement); *Kaczmarek v. Int’l Bus. Machs. Corp.*, 186 F.R.D. 307 (S.D.N.Y. 1999) (finding that named plaintiffs failed to  
 24 satisfy the Rule 23(a)(3) typicality requirement where none of the plaintiffs had  
 25 purchased one of the products at issue in the litigation); *Guido*, 2012 WL 2458118  
 26 at \*1 (California and New York class representatives’ claims atypical from those  
 27 at \*1 (California and New York class representatives’ claims atypical from those  
 28 at \*1 (California and New York class representatives’ claims atypical from those

1 of other class members because they were exposed to different product labels than  
 2 other members of the class); *Red v. Kraft Foods, Inc.*, 2011 WL 4599833 (C.D.  
 3 Cal. Sept. 29, 2011) (motion for class certification denied “[b]ecause there are  
 4 significant questions as to the overbreadth of the proposed class, whether it is  
 5 ascertainable, whether common issue (sic) of fact predominate, whether Plaintiffs  
 6 are typical of the purported class, and whether California law applies to the claims  
 7 of nonresidents”).

8 The court’s analysis in *Wiener v. Dannon Co.*, 255 F.R.D. 658 (C.D. Cal.  
 9 2009) is instructive. In *Wiener*, the named plaintiff had purchased Dannon’s  
 10 Activia product, but had never purchased the other two products at issue: Activia  
 11 Light and DanActive. *Id.* at 663. Activia and DanActive contained different  
 12 probiotics and therefore Dannon advertised the products as having different health  
 13 benefits. Dannon argued that Wiener’s claims were not typical of the DanActive  
 14 consumers because the products were advertised separately and involve different  
 15 health benefits that were supported by different studies. *Id.* at 665. Wiener argued  
 16 that she satisfied the typicality requirement because her legal theories were  
 17 identical to those advanced on behalf of all potential class members, and Dannon’s  
 18 advertising, that the products have clinically proven benefits, was identical for both  
 19 products. *Id.* Rejecting Wiener’s argument, the Court stated, a “court must ensure  
 20 that the named plaintiffs have incentives that align with those of absent class  
 21 members so as to assure that the absentees’ interests will be fairly represented” and  
 22 that the absentees’ claims will be adequately pursued. *Id.* (quoting *In re Graphics*  
 23 *Processing Units Antitrust Litig.*, 253 F.R.D. 478, 489–90 (N.D. Cal. 2008)  
 24 (holding that Rule 23(a)(3) typicality requirement was not satisfied where “the  
 25 representative plaintiffs simply do not have the appropriate incentive to establish  
 26 ... violations with respect to all of the absent class members,” as evidence needed  
 27 to prove that defendants conspired to fix prices of products that named plaintiffs  
 28 had purchased would not prove that defendants conspired to fix prices of products

1 that unnamed class members had purchased). Thus, the Court held that because  
 2 Wiener had only purchased Activia and had never purchased DanActive, the  
 3 claims of the unnamed plaintiffs who purchased DanActive were not “fairly  
 4 encompassed by [Wiener’s] claims.” *Id.* at 666.

5 Here, Plaintiff’s claims are not typical of purchasers of Enfamil A.R.®,  
 6 Enfamil Premium Newborn, and Enfagrow® Older Toddler Vanilla Milk Drink.  
 7 Plaintiff spent no money on these products and has no personal stake in the success  
 8 of claims of purchasers of these products. These products, moreover, were  
 9 intended for different consumers, with different needs: newborns, infants who spit  
 10 up frequently, and older toddlers who are no longer on infant formula or breast  
 11 feeding. The product labels said different things about prebiotics, and also said  
 12 different things about other product features potentially relevant to consumer  
 13 product purchase decisions.

14 For example, the motivations for a consumer to purchase Enfamil A.R. (for  
 15 infants with frequent spit up) are unique among the products: a purchaser of  
 16 Enfamil A.R. would have no reason to use the product unless her baby had  
 17 experienced frequent spit up. A purchaser of Enfamil Premium Newborn would  
 18 most likely be a person who elected not to breast feed and is looking for a product  
 19 that provides complete nutrition. A purchaser of a toddler beverage would be  
 20 looking for a product to enhance the nutritional intake of a child also consuming  
 21 solid food.

22 Nothing in the FAC suggests that Ms. Routé’s purchase motivations aligned  
 23 with those of purchasers of these other products, or that what might be “material”  
 24 for her would also have been material for others. She therefore cannot be typical  
 25 of such persons, and her claims lack commonality with theirs.

26  
 27  
 28

## **CONCLUSION**

For the foregoing reasons, Mead Johnson & Company, LLC respectfully requests that this Honorable Court strike the allegations of Plaintiff's First Amended Complaint as set forth in the Motion.

DATED: December 10, 2012 SEDGWICK LLP

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